

What You Don't Know about RESPA Can Hurt You

from the desk of David M. Touchstone

From telephone calls and inquiries I receive, I have inferred that although many in the real estate community are aware of the existence of RESPA, most folks just don't know that much about what it does. RESPA stands for the Real Estate Settlement Procedures Act. RESPA does not apply to all real estate transactions. For instance, it does not apply to any cash sale, or to owner financed transactions, or to the sale of land, timber, and commercial property. RESPA does apply to any sale or refinance of one to four family residential real estate which is financed by any government supervised lender, such as a mortgage company, bank, savings and loan, credit union, and finance company.

RESPA was passed into law by the United States Congress in 1974. The purposes for its enactment were as follows: to promote full disclosure to borrowers of the cost of all services involved in the sale or refinance of the borrower's home, to permit borrowers to compare prices of service providers, to promote competition among service providers, and to prohibit bribes and kickbacks. As a result of the statute itself and the regulatory authority delegated to HUD, the following were the principal features of the act: the requirement that all covered transactions be disclosed on a standard form (the famous HUD-1 settlement statement), the requirement that mortgage lenders and mortgage brokers supply prospective borrowers with good faith estimates and



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booklets explaining settlement charges, intense and specific rules to prohibit the abuse by lenders of funds escrowed for taxes and insurance, the creation of rights for borrowers to select service providers despite contractual commitments to the contrary, and criminal fines and procedures to bar kickbacks and bribes.

What I want to focus attention on in this article is that portion of RESPA that prohibits bribes and kickbacks. You may be saying to yourself, "Uh oh, another one of those boring lawyer diatribes." But before you get bored too soon, read on.

Even though RESPA has been part of the legal landscape for 30 years, few significant enforcement actions against violations of the criminal provisions have taken place until the last four or five years. Over time there has been a rising chorus of consumer advocacy groups petitioning Washington to

step up enforcement. During the period of lax enforcement (1974-2001), many service providers were lulled into a sense of false security and engaged in a growing pattern of unlawful practices. Guess what! The party's over. As late as 1999, HUD employed only 3 investigators to ride herd on the entire nation. Recently, HUD has increased that staff to 45 investigators. And it's not only the 45; HUD is also in the process of networking with U. S. Attorneys and state insurance and banking regulators to increase enforcement clout.

Consider these recent actions: In Arizona, a title lawyer was busted by HUD for giving certificates to his favorite realtors entitling the realtors to dollar for dollar matching on their advertising. In Tennessee, HUD shut down a title company that was paying kickbacks to real estate brokers and mortgage brokers for referrals. In Austin, Texas, seven title companies were fined over \$130,000.00 for providing free virtual tours to realtors who referred business to them. In California, a mortgage company was fined by HUD for paying real estate agents \$100.00 for filling out and submitting on-line loan applications; HUD does not consider filling out loan applications to be a compensable service. In Atlanta, Georgia, a mortgage company and 14 real estate agents earned the wrath of HUD; in these cases the mortgage company set up the agents as sham employees and paid each of them \$400 per mortgage application. In the Atlanta case, HUD fined not only the mortgage company but the agents as well.

All of the cases cited above occurred since 2001. In the last three years, the number of anti-kickback complaints received by HUD each year has doubled and will probably continue to grow at an astronomical rate. In the past, many people who

knew of violations didn't report them because they didn't know to whom the report should be made or they were skeptical that any action would be taken. All that's changing. Moreover, with the dramatic contraction taking place in the mortgage industry, many service providers are being tempted to do no-no's in order to keep their place at the table. So, expect a lot of folks to be getting in trouble.

But here's the thing about RESPA that a lot of real estate agents just don't realize. It's not just *giving* a kickback that gets one in trouble. The fine and the jail time are just the same for people who *TAKE* the kickback. Now we all know that real estate agents are the dominant producers of sales and referrals. Accordingly, real estate agents and brokers have a natural gravity field that attracts service providers who just can't behave. While it's nice to be flattered, that kind of flattery can get you big-time jail time, fines you can't afford, and can get your ticket pulled. So like Baretta used to say (before he fell off the wagon) "If you can't do the time, don't do the crime."

So, just what is that fine, and just what is that time? Try this on for size: \$10,000.00 for each violation and one year in jail for each violation. So imagine a really bad tempered HUD agent who wants to make a major example of you for writing those 20 applications for that extra \$300.00 Mr. Smoothie Mortgage Broker talked you into. Theoretically, you're looking at \$200,000.00 and 20 years in the pokey. Truthfully, HUD hasn't started coming down with that kind of heat – yet.

And what about all the ways Mr. Smoothie tells you, "don't worry, this'll work, trust me". Which of those high-falootin' techniques are clever enough to skirt the law? The answer is just what you

were afraid of: “none of them.” Like the old saying goes, “If it sounds too good to be true, it probably is.” First, let’s look at the statute itself. The operative provision is 12 USC 2607(a); it states: “No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.” Please note the words “anything of value.” They mean what they say – anything. While HUD has made an exception for what has come to be called “trash and trinkets”, you know, the cups and pens and little sticky pads, anything that has real value is a no-no.

While no doubt Mr. Smoothie will think of something that’s not on this list, HUD has come up with a pretty comprehensive list of things which are prohibited. Everything on the following list has officially been determined by the government to violate the anti-kickback law:

- It is illegal to receive cash for referrals.
- It is illegal to receive trips, vacations, sporting event tickets, or tickets to other events for referrals.
- It is illegal to receive prizes for referrals.
- It is illegal to receive discounts for products or services for referrals.
- It is illegal to receive payment to you or on your behalf for advertising that is disproportionate to your own payment. Example: you pay half and the mortgage guy pays half but you get 95% of the ad and he gets 5% of the ad; that’s illegal.
- It is illegal to receive other advertising or promotional items such as a

paid for virtual walk-through or printed material such as mail outs.

- It is illegal for other service providers to provide you with free or below cost continuing education.
- It is illegal for mortgage companies to pay real estate brokerages greater than market value rent for the opportunity to place their employees on site to receive referrals.
- It is illegal for service providers to supply real estate brokers and mortgage lenders with free or less than market value rents for the purpose of obtaining referrals. Likewise it is illegal to receive those benefits for referral of business.
- It is illegal for real estate agents to receive payment for “taking loan applications.”

Finally, even if it’s not on this list, if it’s got value, you can’t take it, no matter what Mr. Smoothie tells you.

By the way, if HUD overlooks you, maybe the hungry lawyer won’t. RESPA provides for treble (triple) damages and recovery of attorney fees for civil suits brought to recover illegal kickbacks. Can you spell “class action”? How about those 20 bogus fees you were paid for “taking loan applications”? You won’t be able to pay the judgment, but it’s the discovery part (depositions, etc.) that’ll make you nuts. When that lawyer makes you explain every deposit you’ve ever made in your checking account, and subpoenas your whole client list to ask them what they think about your taking kickbacks at their expense, you’ll be ready to cry for your mama.

Well, to wrap things up, if you know of a person who has been giving or taking kickbacks for referral of services and you

wish to report it, here's the watchdog:

Ivy Jackson, Director, Office of RES-
PA and Interstate Land Sales, Department of
Housing and Urban Development, 451 Sev-
enth Street NW, Washington, DC 20410, Fax
202-708-0502,
Phone 202-708-4559.